IN THE
SUPREME COURT
STATE OF MISSOURI

No. 86332

HALLMARK CARDS, INC.,
Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE KAREN A. WINN, COMMISSIONER

REPLY BRIEF FOR APPELLANT

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I.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT SECTION 32.069, RSMO CUM. SUPP. 2003, DOES NOT BAR INTEREST THAT ACCRUED UNDER SECTION 32.065.

A. Introduction

This point turns on the construction of section 32.069, which provides:

> Notwithstanding any other provision of law to the contrary, interest shall be allowed and paid on any refund or overpayment ***at the rate determined by section 32.068*** only if the overpayment is not refunded within one hundred twenty days from [certain defined events].[1]

The above-emphasized words of limitation in section 32.069 were the focal point of Hallmark's opening brief. Yet those words are not discussed in the Director's brief. The Director simply ignores them. Can it really be so hard for the Director to believe that the General Assembly meant exactly what it said and said exactly what it meant? The statute's express words demonstrate the Legislature's eminently reasonable desire not to apply new rules to a game that had already been played.

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[1] Emphasis added here and throughout unless otherwise noted.

B. Section 32.069 Does Not Conflict With Sections 144.190 or 32.065 Because Section 32.069 Can Only Bar Interest Determined Under the Section 32.068 Rate

As acknowledged by the Director, neither section 144.190 nor section 32.065 were amended (Dir. Br. 6). Thus, section 144.190 still requires the payment of interest at the rate "determined by section 32.065[.]" Section 32.069 does not conflict with those statutes because the only interest that it can bar is interest "at the rate determined by section 32.068." It does not bar interest at rates calculated under any statute, including section 32.065. Therefore, the language upon which the Director focuses (Dir. Br. 8),"[n]otwithstanding any other provision of law to the contrary," simply does not apply.[2]

The Director confuses the accrual of interest with the payment of interest. Sections 32.065 and 32.068 set rates of interest. Sections 32.065 and 32.068 do not impose the obligation to pay interest; those obligations are found in section 144.190 and in section 32.069, when it applies. Interest is a product of the rate, the amount of principal, and the accrual duration. Although the Director's brief is not entirely clear on this, she apparently claims that effective January 1, 2003, all interest that had accrued for any period, whether prior to January 1, 2003 or thereafter, was to be determined under a section 32.068 rate

[2] Although there may be a conflict between the rates set forth in Sections 32.065 and 32.068 for interest accruing on or after January 1, 2003 (a conflict that would presumably be governed by section 32.068 as the most recent enactment), there is no conflict with respect to accrued interest through December 31, 2002.

(Dir. Br. 10).[3] That was the basis of the Commission's decision as well (App. Br., App. A-14). But that position is contrary to section 32.068.

Section 32.068.2 provides that the state treasurer is to calculate the section 32.068 rates and submit them to the Director "***no later than thirty days prior to the end of each calendar quarter***." That subsection also provides that the Director "shall apply the calculated rate of interest to all applicable situations during the next calendar quarter after the release of the calculated rate of interest." The Director does not explain, nor did the Commission, how the state treasurer or Director could possibly meet those time deadlines for much of Hallmark's refund period, which began in June 2000. Obviously, the Legislature intended for section 32.068 rates to apply on January 1, 2003, and no sooner. That is exactly what the Director instructs on her internet website entitled "Statutory Interest Rates" (App. Br., Appendix 7). There, section 32.068 rates are reported for 2003 and 2004, on a quarterly basis, and section 32.065 rates, quoted on a yearly basis, are reported for prior years. If the Director really believed what she has represented to this Court, she would have insisted that the state treasurer compute annual interest rates under section 32.068, quoted on a quarterly basis, going back many years prior to 2003.

Therefore, when a refund is granted after January 1, 2003, for overpayments made prior to January 1, 2003, the Director is to award interest under the section 32.065 rate through December 31, 2002, and, if payment is made outside of the grace period, under the section 32.068 rate thereafter. The Director's argument that section 32.069 bars all

[3] That claim seems at odds with the Director's concession on pages 8-9 of her brief.

interest because the only interest that could be awarded would be calculated at a rate determined under section 32.068 is entirely without merit.

Last, the Director acknowledges that section 32.069 became effective on June 19, 2002 (Dir. Br. 4). Yet the Director claims that she did not apply section 32.069 until January 1, 2003 (Dir Br. 7, 10). The question is why? The answer is clear. Section 32.069 bars only interest "at the ***rate*** determined by section 32.068," and the section 32.068 ***rate*** did not apply to interest accruals until January 1, 2003. If the Director truly believed that section 32.069 barred all interest under any statute's rate, including section 32.065's rate, then the Director would have denied interest on all refunds issued after June 19, 2002, if issued within the so-called grace period.

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING INTEREST ON THE REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THE COMMISSION'S CONSTRUCTION OF SECTION 32.069, RSMO CUM. SUPP. 2003, RENDERS IT AN ILLEGAL RETROSPECTIVE LAW THAT VIOLATES ARTICLE I, SECTION 13 OF THE MISSOURI CONSTITUTION.

As noted above, the express language of section 32.069 does not apply retrospectively. However, as the Director construes section 32.069, it takes away and impairs a vested right to interest that had already accrued under the section 32.065 rate for all periods prior to June 19, 2002, the effective date of section 32.069.

The Director does not apparently quarrel with Hallmark's claim that its right to interest through June 19, 2002, was a vested right. Rather, the Director argues that Hallmark was not deprived of that right since Hallmark was allegedly given from June 19, 2002, to December 31, 2002, to file its refund claim and recover that interest. In support of that argument, the Director cites *North Supply Co. v. Director of Revenue*, 29 S.W.3d 378, 380 (Mo. banc 2000) and its holding ***that the Legislature*** is free to shorten a statute of limitations so long as claimants are given a reasonable time within which to bring their claims (Dir. Br. 11-12). The Director's argument is wholly without merit as it hinges entirely upon a misstatement of fact, namely that ***the Legislature*** delayed operation of section 32.069 until January 1, 2003.

Section 32.069 became effective on June 19, 2002, when it was signed into law. The Director admitted that fact in her brief (Dir. Br. 4, 7) and in paragraph 8 of her answer (L.F.

7). Nothing in section 32.069 indicates that it is effective other than on June 19, 2002. But in Point II, the Director asserts that "the legislature did not deprive Hallmark of its right to interest … [, it] merely shortened-prospectively-the period in which Hallmark could act if it wanted to exercise that right [to interest]" and that "the legislature left Hallmark more than six months[,]" from June 19, 2002, to January 1, 2003, to file its claim and still recover interest (Dir. Br. 11). The ***Legislature*** did nothing of the sort. Apparently, the ***Director*** decided that she could administratively change the effective date of section 32.069 as a matter of law (Dir. Br. 10, n. 2). She cites nothing in the record to even support her assertion that she in fact ignored the effective date of section 32.069 for any party, but assuming the truth of such an assertion, the Director does not, and cannot, cite any authority for the proposition that the Director can alter Missouri statutes.

Section 32.069 became effective on the day that it was signed into law, June 19, 2002. It did not become effective on January 1, 2003, as the Director "interpreted and applied" it (Dir. Br. 5, 12). The Director states that had Hallmark filed its refund claim between June 19, 2002, and January 1, 2003, the Director would have granted the interest Hallmark seeks (Dir. Br. 10). Yet nothing in section 32.069 limits its application to claims filed on or after January 1, 2003. If section 32.069 can bar interest under any section's rate as the Director claims, then it can act to deny interest on any claim submitted on or after 119 days prior to June 19, 2002. Having read the words "at the rate determined by section 32.068" out of the statute in Point I, the Director now reads words into the statute in Point II. There simply are no words in section 32.069 that apply the so-called grace period only to claims filed on or after January 1, 2003.

Furthermore, in an interesting twist, after ignoring the words "at the rate determined by section 32.068" in Point I, the Director in Point II attempts to use those words to "cross-reference" section 32.068.3's use of the January 1, 2003 date (Dir. Br. 13). But section 32.068 was also effective on June 19, 2002, as the Director conceded elsewhere in her brief (Dir. Br. 7). The state treasurer's duties under section 32.068.2 certainly began before January 1, 2003. Section 32.068.2 required the state treasurer to provide to the Director by December 2, 2002, thirty days before the first quarter of 2003, the interest rate to be "applied" in that quarter. Section 32.068.3, in turn, instructs the Director to begin "apply[ing]" the rates on January 1, 2003. Section 32.068.3 does not change section 32.068's effective date and it certainly did not change section 32.069's effective date. Had the Legislature intended for section 32.069 to apply on or after January 1, 2003, it would have said so.

As the Director interprets section 32.069 in Point I, but without the Director's amendment of its effective date in Point II, no interest is due on any refund claim granted within the grace period any time after June 19, 2002. This interpretation unmistakably takes away Hallmark's vested right to interest that had accrued up to June 19, 2002.

Apparently recognizing the weakness of her main argument in Point II, the Director alleges that Hallmark has no standing to challenge section 32.069's constitutionality because Hallmark did not file its refund claim during the period that the ***Director*** allegedly extended the effective date of section 32.069 (Dir. Br. 12-13). The Director cites no authority for this position. Furthermore, the Director cites no fact in the record or otherwise that Hallmark or anyone else knew of the Director's apparent amendment of

section 32.069's effective date. As section 32.069 is written, and based upon the Director's construction of it in Point I, Hallmark had no ability to recover its accrued interest once section 32.069 was signed into law. The only way a taxpayer could be sure that it would recover interest was to file its refund claim 121 days ***before*** June 19, 2002.[4] Of course taxpayers would have to see the future to have known to do that.

Hallmark would be deprived of accrued interest under the Director's construction of section 32.069 in Point I. Under the Director's construction, section 32.069 would take away Hallmark's vested right to interest. Therefore, Hallmark would be entitled to interest under the section 32.065 rate until December 31, 2002, and, because section 32.069 would be void, under the section 32.068 rate thereafter.

[4] Filing a refund claim on any date thereafter would allow the Director to grant the claim after June 19, 2002, while still within the so-called grace period.

CONCLUSION

For all of the foregoing reasons, Hallmark is entitled to accrued interest. The Commission's decision to the contrary should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this ___ day of December, 2004, to Jim Layton, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102 and to Roger Freudenberg, Missouri Department of Revenue, P.O. Box 475, Jefferson City, MO 65105-0475.

CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 2,292 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.